United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7575

In The

United States Court of Appeals

For The Second Circuit

GETTY OIL COMPANY (Eastern Operations), INC.,
Plaintiff-Appellant-Cross-Appellee,

-against-

SS "PONCE DE LEON", her engines, tackle, etc., SUN LEASING CO. and TRANSAMERICAN TRAILER TRANSPORT, INC.,
Defendants-Appellees-Cross-Appellants.

On Appeal from the United States District Court for the Southern District of New York.

BRIEF FOR DEFENDANTS-APPELLEES AND CROSS-APPELLANTS, SUN LEASING CO. and TRANSAMERICAN TRAILER TRANSPORT, INC.

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SS "PONCE DE LEON", her engines, tackle, etc., SUN LEASING CO. and TRANSAMERICAN TRAILER TRANSPORT, INC.,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF DEFENDANTS-APPELLEES AND CROSS-APPELLANTS, SUN LEASING CO. and TRANSAMERICAN TRAILER TRANSPORT, INC.

STATEMENT OF ISSUES

This case concerns a collision in New York Harbor off Norton's Point on May 10, 1973 between S/S "WILMINGTON GETTY" and S/S "PONCE DE LEON".

After a trial before United States District Judge Richard H. Levet, without a jury, the Court found the "WILMINGTON GETTY" liable for 20% of the damages and the "PONCE DE LEON" liable for 80% of the damages. The following issues are now presented to this Court on appeal:

1. Was Judge Levet's determination that an anchored vessel has the obligation to take action, if she can, to avoid a collision, error as a matter of law?

2. Was Judge Levet's determination that "WILMINGTON GETTY" had the means, opportunity, and last clear chance to avoid the collision, clearly erroneous?

3. Was Judge Levet's assessment of the proportionate fault of each vessel, clearly erroneous?

PRELIMINARY STATEMENT

The District Court found that both vessels contributed to the collision. Judge Levet found the "PONCE DE LEON" responsible for the largest part of the damages and a final judgment was entered against the owners of the "PONCE DE LEON" in the sum of $84,350.00, including interest.

Getty Oil Company now appeals to this Court and seeks a finding of sole fault on part of "PONCE DE LEON", but alternati ly suggests that an amendment of the percentages of proportionate fault would be appropriate. Sun Leasing Co. and Transamerican Trailer Trnasport, Inc. have cross-appealed, also seeking an amendment of the percentage of damages.

(a) Initially, it should be pointed out that

Getty's attorney attached to its brief as Annex II, "Recommendations on Use of Radar Information as an Aid to Avoiding Collisions at Sea", which document was not submitted in evidence at the trial below. It is submitted that the aforesaid document is not properly before this Court.

Getty's counsel requests this Court to rule as to applicability of said "Radar Recommendations" to Inland Waters. No evidence was offered by Mariners with regard to said "Radar Recommendations" which now apply to vessels in the open sea. There is no testimony whether such "Recommendations" would be appropriate in crowded harbor areas such as New York. It may not be, as contended by Getty's counsel, advisable for this Court to so rule in the interest of maritime safety. We simply do not know.

In any event, Recommendation (6) is noteworthy with regard to the actions of the "PONCE DE LEON".

> "(6) The direction of an alteration of course is a matter in which the mariner must be guided by the circumstances of the case."

(b) Getty on the trial below submitted no evidence with regard to the following findings of the District Court:

1. The hazardous and dangerous location where the "WILMINGTON GETTY" anchored, considering the fog and traffic congestion on May 10, 1973.

2. The failure of the "WILMINGTON GETTY" to keep her engines on "Standby" while anchored in a hazardous locale.

3. The failure of the "WILMINGTON GETTY" to "let go the anchor chain" after observing the "PONCE DE LEON" on radar.

Now, on this appeal, counsel for Getty has submitted its own analysis and interpretation of the charts and documents in support of its position that Judge Levet's findings were "clearly erroneous", pursuant to F.R.C.P. 52(a). Captain Dervin, Sun/TTT's expert, a ship's Master for over 28 years, testified at the trial with regard to the aforementioned duties and failures of the "WILMINGTON GETTY". This testimony was totally uncontroverted by Getty at the trial below. If Getty could have discredited such testimony finding fault with the actions and/or inactions of the "WILMINGTON GETTY", why did it not present such evidence at the trial

It is submitted that Getty's arguments on this appeal with regard to the findings of Judge Levet are not based on the evidence in the trial below.

STATEMENT OF FACTS

Early in the morning of May 10, 1973, the "WILMINGTON GETTY" proceeded up Ambrose Channel in dense fog. (JA 217, Ex. 4). The "WILMINGTON GETTY" traversed Ambrose Channel at various speeds but averaged approximately 11 to 12 knots. (Ex. 3, Ex. 5). The Master of the "WILMINGTON GETTY" decided that due to tide conditions and fog,he would anchor off Norton's Point, awaiting a favorable tide. (JA 391). As the "WILMINGTON GETTY" came abeam of buoy 18, which is the northern most buoy in Ambrose Channel, the Master of the

"WILMINGTON GETTY" came right and headed toward the customary anchorage. (Ex. 5, JA 217). Instead of proceeding into the prescribed anchorage area, the Master of the "WILMINGTON GETTY" dropped the hook after proceeding a short distance past buoy 18. (Ex. 2, JA 218).

At 0856 hours the "WILMINGTON GETTY" anchored outside the designated anchorage off Norton's Point with three shots of anchor chain in the water. (Ex. 2, JA 235, 241). Shortly after anchoring, the "WILMINGTON GETTY" transmitted a security call advising all vessels in the vicinity that the "WILMINGTON GETTY" was anchored off Norton's Point. (JA 229). The security call was never repeated again until the time of the collision. (JA 230, 231).

The Master of the "WILMINGTON GETTY" put the vessel's engines on "FINISH WITH ENGINES" (F.W.E.) upon anchoring the vessel. (JA 161). Apparently, the Master advised the vessel's engineers to place the engines on a state of readiness, which would take approximately three to five minutes to get the vessel underway. (JA 221). Watch Officer Farago was not given any instructions regarding the state of readiness of the engines, on relieving the watch at 1200 hours on May 10, 1973. (JA 160, 232). Mr. Farago was under the impression that it would take approximately 15 minutes to go from F.W.E. to STANDBY ENGINES (S.B.E.). (JA 180-182).

At approximately 1146 on May 10, 1973, the "PONCE DE LEON" arrived at Ambrose Light Tower and was advised by the pilot aboard the S.S. "SEALAND BOSTON" that said vessel

was proceeding up Ambrose Channel. (JA 266, 303). The Master of the "PONCE DE LEON" advised the Pilot on board the "SEALAND BOSTON" that the "PONCE DE LEON" would follow the "SEALAND BOSTON" up the Channel. (JA 304). The "PONCE DE LEON" then proceeded up Ambrose Channel behind the "SEALAND BOSTON" and maintained a distance of approximately one mile astern of the "SEALAND BOSTON". Three to four other vessels were also proceeding astern of the "PONCE DE LEON" up the Channel at the same speed and maintaining a fixed relative position behind the "PONCE DE LEON". All of the vessels proceeded at various speeds behind the "SEALAND BOSTON" which was the lead vessel proceeding up Ambrose Channel. (JA 304-307).

The Master of the "PONCE DE LEON" was on the bridge in charge of navigation. The Third Mate, a licensed officer, was also on the bridge as a Watch Officer. The helmsman was on the wheel and the Chief Officer was on the bridge wing as an additional lookout. Further, the Second Officer was on the bow acting as lookout together with the Bosun and two seamen. Both of the PONCE DE LEON's radars were operating and being constantly monitored by the Master and Third Mate. The "PONCE DE LEON" was sounding a prolonged blast on the fog horn at intervals of less than one minute, the proper fog signal for a vessel underway, pursuant to U.S. Inland Rules Article 15(a), 33 U.S.C. §191(a). Also, the vessel's bridge to bridge radio telephone was set on channel 13 and being monitored as required by the Bridge to Bridge Radio Telephone Act, 33 U.S.C. §1201 et. seq. (JA 268,269, 282,297,308).

After proceeding approximately halfway up Ambrose Channel, the Master of the "PONCE DE LEON" was advised by radio that his tugs could not be made available due to fog and that the vessel should enter the nearest safe anchorage. (JA 306, 307). At that time, the Master of the "PONCE DE LEON" with this information, decided to alter course to the right upon passing buoy 18 and anchor in the only available anchorage area. There are no other safe anchorages until passing buoy 18 and it is highly improvident for a Master to anchor in the middle of Ambrose Channel in such conditions as existed on May 10, 1973. (JA 307, 309,310).

Both radars on the "PONCE DE LEON" were being continually monitored by the Master and Watch Officer. The radars indicated that as many as eight targets were being tracked on the radarscope, which was set on the two mile scale. (JA 270, 271, 328).

During this period of time, the "WILMINGTON GETTY" was swinging with the tide. At approximately 1300 hours on May 10, 1973, the "WILMINGTON GETTY" completed swinging with the tide and the vessel was now in a different position than the position at which the "WILMINGTON GETTY" originally anchored at 0856 hours. (JA 146, 235, 236). At approximately the same time that the "WILMINGTON GETTY" was moving through the water, completing her swing with the flood tide, the "WILMINGTON GETTY" was initially observed on radar by the "PONCE DE LEON". The "PONCE DE LEON" was just approaching buoy 18 when the Master observed an additional target on the radarscope, which later turned out to be the

"WILMINGTON GETTY". The target was in such close proximity to the "SEALAND BOSTON" as to give the appearance of one target on the radarscope. (JA 271, 273). The Master of the "PONCE DE LEON" immediately called over channel 13 to a "vessel underway" off Norton's Point, requesting her course and intention. (JA 290, 291). The Master of the "PONCE DE LEON" repeated this inquiry several times, but received no response.

The "PONCE DE LEON was then passing buoy 18 at 1308 hours and her Master ordered the vessel's course altered to the right in order to proceed to a safe anchorage. (JA 290, 291, 313). The Master of the "PONCE DE LEON" carefully observed the target on radar as well as the numerous other targets on the scope. From his observations of the radar and extensive pilotage experience, he determined that the "WILMINGTON GETTY" was moving very slowly up the right side of the channel, awaiting the arrival of her tugs to proceed into New York Harbor. The Master of the "PONCE DE LEON" with all his years of experience had never observed a vessel anchored in this customary navigable throughway used by vessels approaching the only safe sanchorage after exiting Ambrose Channel at buoy 18. (JA 312, 313). The "PONCE DE LEON" then passed buoy 18, and as the "WILMINGTON GETTY" before her that day, her Master ordered the course altered to the right to proceed to anchor. (Ex. 20). The PONCE DE LEON's engine was set on "half ahead" and then reduced to "dead slow ahead". (Ex. 20).

At this very moment, at 1308 hours, the Watch Officer of the "WILMINGTON GETTY" observed on radar the "PONCE DE LEON" turning right at buoy 18. (JA 152). He immediately considered a risk of collision to exist when the "PONCE DE LEON" turned right at buoy 18. (JA 404, 1975, 185, 492, 495, 496, 498). The Watch Officer of the "WILMINGTON GETTY" stated that he watched the "PONCE DE LEON" continuously on radar, but he took no other action, such as placing the engines on standby or advising the seamen on the bow to standby the anchor. (JA 156, 176, 177). Within approximately two to three minutes after passing buoy 18, the Mate on the "WILMINGTON GETTY" responded to the inquiries of the "PONCE DE LEON" and stated that the "WILMINGTON GETTY" was not underway, but at anchor.

After turning right at buoy 18, the "PONCE DE LEON" continued to come right on a steady curve and never erratically altered its course, until the point of collision. (JA 286, 314). At the time of the transmission from the mate on the "WILMINGTON GETTY" advising that he was at anchor, the "PONCE DE LEON" was approximately one-half mile from the "WILMINGTON GETTY" and the "PONCE DE LEON" had been turning right for approximately two to three minutes. The Master of the "PONCE DE LEON" quickly evaluated the situation and determined that he could not stop his engines because the flood tide would have carried the "PONCE DE LEON" down on the "WILMINGTON GETTY" and struck her broad side. (JA 315,316).

He also determined immediately that the "PONCE DE LEON" could not come left to avoid a collision since she

was already swinging right and left rudder would not overcome the right swing and could not bring the vessel left past the "WILMINGTON GETTY". (JA 316). The Master therefore determined that the only safe alternative was for the "PONCE DE LEON" to continue coming right and avoid the "WILMINGTON GETTY". (JA 317). The Master of the "PONCE DE LEON" was also seriously concerned about not coming too far right, since the possibility of grounding on the shoals off Norton's Point was a serious danger, if the "PONCE DE LEON" came too far right. (JA 317). The Master of the "PONCE DE LEON", therefore, continued to monitor the "WILMINGTON GETTY" on radar and come right in an effort to pass between the bow of the "WILMINGTON GETTY" and the shoals off Norton's Point. Just prior to collision, the Master of the "PONCE DE LEON" visually sighted the "WILMINGTON GETTY" and ordered hard left in an effort to swing the stern of the "PONCE DE LEON" away from the "WILMINGTON GETTY". (JA 340, 341). This maneuver proved to be fruitless and the "WILMINGTON GETTY" and "PONCE DE LEON" collided at 1314 hours.

ARGUMENT

POINT I

DISTRICT COURT DID NOT ERR AS A MATTER OF LAW IN FINDING THE "WILMINGTON GETTY" AT FAULT AND CONTRIBUTING TO THE PROXIMATE CAUSE OF THE COLLISION.

The District Court found the "PONCE DE LEON" negligent and responsible for 80% of the damages or four times more at fault than the "WILMINGTON GETTY". (JA 126).

A. Getty now contends that when a moving vessel

is found negligent, an anchored vessel, as a matter of law, cannot be also found negligent and liable for a proportion of the damages sustained.

This is not the law. Admittedly, there is a presumption that when a moving vessel collides with a "properly" anchored vessel, there is said to be a presumption against the former. However, this does not relieve the anchored vessel from the duty of anchoring in a safe location. Victorias Milling Co., Inc. v. GULFPORT, 166 F. Supp. 396, 399 (S.D.N.Y., 1958); THE BRIGHT, 38 F. Supp. 574, 581 (D. Md. 1941); THE LIMON, 35 F. 2d 731 (1 Cir. 1929); LA BOURGOGNE, 86 Fed. 475, 477-478 (2 Cir. 1898); Ross v. Merchants & Miners Transportation Co., 104 Fed. 302, 303 (1 Cir. 1900).

More importantly, an anchored vessel has the duty to avoid a collision if it has the means and opportunity to do so. Sun Oil Co. v. S.S. GEORGEL 245 F. Supp. 537, 545 (S.D.N.Y. 1965); Wells v. Armstrong, 29 Fed. 216, 219 (S.D.N.Y., 1886); Villian & Fassio E. Compania v. Tank Steamer E.W. Sinclair, 206 F. Supp. 700, 710-711 (S.D.N.Y., 1962); THE RICHMOND, 63 Fed. 1020, 1021 (2 Cir. 1894); Victorias Milling Co. v. The S.S. GULFPORT, 166 F. Supp. 396, 398, 399 (S.D.N.Y., 1958); Rederiet For M/T SEVEN SKIES v. S/S NORTH DAKOTA, 242 F. Supp. 385, 386 (S.D.N.Y. 1962).

Whether an anchored vessel had the means, opportunity, and last clear chance to avoid the collision, are questions of fact to be determined by the trial Judge. The fact that the moving vessel was found to be negligent does not automatically relieve the anchored vessel of all responsibility, but, rather

depends on the circumstances of the particular case. The District Court below, properly found that the anchored "WILMINGTON GETTY" had certain duties which she failed to perform and that said failures directly contributed to the collision. (JA 121-125). Said findings of fact were not clearly erroneous but fully supported by the evidence at the trial (JA 112).

B. Further, Getty contends that Judge Levet erred in construing U.S.A. v. Reliable Transfer, Inc., 421 U.S. 396 (1975). It is submitted that Judge Levet properly appraised the effect of Reliable and attorneys for Getty have taken the language of the District Court out of context in its brief on the appeal herein.

Judge Levet's discussion and analysis of Reliable (JA 113-117) certainly speaks for itself. Getty contends that Judge Levet ruled that Reliable altered the standard of "what constitutes negligence". This is a total misinterpretation of Judge Levet's decision.

Judge Levet simply stated that the court should not continue to "excuse a recognized fault" under the "major-minor" fault rule as courts had previously done in pre - Reliable decisions. Now, he indicated, the court must look to the facts of each case, determine whether any fault exists on the part of each of the vessels, and allocate fault proportionately based on the comparative fault of the respective parties. The U.S. Supreme Court in Reliable pointed out the inequities of the "major-minor" fault rule as well as the "divided damages" rule. Mr. Justice Stewart stated on page 406:

> "The Court has long implicitly recognized the patent harshness of an equal division of damages in the face of disparate blame by applying the 'major-minor' fault doctrine to find a grossly negligent party solely at fault. But this escape valve, in addition to being inherently unreliable, simply replaces one unfairness with another. That a vessel is primarily negligent does not justify its shouldering all responsibility nor excuse the slightly negligent vessel from bearing any liability at all." (Emphasis Supplied).

Judge Levet found that "WILMINGTON GETTY" had various duties, that the "WILMINGTON GETTY" failed to perform those duties, and that such failures contributed to the collision. Judge Levet stated that:

> "Consequently, in light of Reliable, this Court cannot excuse nor overlook the faults or omissions of the "WILMINGTON GETTY".

Therefore, it is submitted that Judge Levet did not erroneously construe the effect of Reliable, but that appellant has totally misinterpreted Reliable and its effect, as well as Judge Levet's subsequent appraisal thereof.

Armed with its own interpretation of Reliable, Getty argues that the only reasonable analysis of the incident would be the assessment of sole fault on the part of the "PONCE DE LEON" and that the various faults committed by "WILMINGTON GETTY" are irrelevant. It is submitted that this was not the intention of the U.S. Supreme Court in Reliable and that Judge Levet's analysis accurately reflects the thinking of the U.S. Supreme Court.

C. Getty would have this Court believe that "PONCE DE LEON" was proceeding recklessly in total disregard of other vessels in the area, and that as a matter of law should be found solely at fault for the collision. Such

could not be further from the truth. The Master of "PONCE DE LEON" has an impeccable record of sea going experience and has been a Master for over 20 years. The "PONCE DE LEON" was placed, right from the start, in a very unenviable position. The weather conditions were poor; there were numerous vessels transiting Ambrose Channel, both north and south, and the "PONCE DE LEON" was in the middle of a convoy of vessels heading up a very narrow channel into New York Harbor. (JA 303, 304, 307). Captain Meade had no alternative but to maintain his position in the convoy which was being led by the "SEALAND BOSTON" who had a Sandy Hook Pilot aboard.

Certainly, the precautions by Captain Meade set forth the concern and diligence exerted by him. (JA 327, 328, 329). All of the vessel's deck officers were on duty and the vessel's navigation equipment was being constantly monitored. At his first opportunity, Captain Meade turned right at buoy 18 to seek a safe anchorage. (JA 310, 313, 513). For all intents and purposes, he had no other choice.

Getty's counsel repeatedly refers to "blind turns" by the "PONCE DE LEON" in referring to its turning right at buoy 18. The track of "PONCE DE LEON" was the standard, safe, and customary path followed by <u>all</u> vessels seeking to anchor at the only safe anchorage after exiting Ambrose Channel at buoy 18. Such a maneuver was not reckless, and in fact this maneuver was the identical one performed by the "WILMINGTON GETTY" earlier that morning when seeking a safe anchorage. The officers aboard "PONCE DE LEON" constantly observed the "WILMINGTON GETTY" on radar and both the Master and Mate on watch

calculated that the "PONCE DE LEON" would clear ahead of "WILMINGTON GETTY". However, the side of the "PONCE DE LEON" struck the bow of "WILMINGTON GETTY". Obviously, all of these circumstances were taken into account by the District Court in reaching its determination.

POINT II

THE DISTRICT COURT'S FINDINGS OF FACT WERE NOT CLEARLY ERRONEOUS

A. THE FINDINGS OF THE DISTRICT COURT WERE NOT "CLEARLY ERRONEOUS" WITHIN THE MEANING OF RULE 52(a) F.R.C.P.

Rule 52(a) of the Federal Rules of Civil Procedure provides in substance that the findings of fact of the Trial Judge in a non-jury case "shall not be set aside unless" the reviewing court is convinced that the finding is "clearly erroneous". In order to reverse, the reviewing court must have the definite and firm conviction that a mistake has been committed. The cases under this rule are legion including several in the Supreme Court of the United States.

United States v. United States Gypsum Co., 333 U.S. 869 (1948).
Guzman v. Pichirilo, 369 U.S. 698 (1962)
McAllister v. United States, 348 U.S. 19 (1954)

The "clearly erroneous" standard for appellate review is a strict one, and the fact that the reviewing court disagrees with the conclusion reached by the Trial Judge does not establish the findings to be "clearly erroneous". B's Co., Inc. v. B.P. Barber & Associates, Inc., 391 F. 2d 130, 132 (4 Cir., 1968). The findings of fact by the Trial Judge, sitting without a jury, should not be set aside unless

it is clearly demonstrated that they are without adequate evidentiary support or induced by an erroneous view of the law.

In fact, the courts use such terms as "grossly inadequate" as a prerequisite to setting aside the findings of fact of the Trial Judge. Hoff v. U.S., 268 F. 2d 646 (10 Cir., 1959).

B. THE "WILMINGTON GETTY" WAS ANCHORED IN A HAZARDOUS AND DANGEROUS LOCATION.

The District Court properly found that the "WILMINGTON GETTY"was anchored in a"dangerous or hazardous location". (JA 121). Getty's counsel relies on the fact that various vessels passed the "WILMINGTON GETTY" on the day in question without a collision. Further, Getty contends the "WILMINGTON GETTY" was anchored between 200 -375 yards outside the line of buoys extending past buoy 18. Getty's counsel totally disregards the facts that "WILMINGTON GETTY" was anchored outside the normal anchorage area and at the head of the customary navigable throughway used by vessels approaching the only safe anchorage after exiting Ambrose Channel at buoy 18. (Ex. 2, JA 468, 471, 480).

A review of the New York Harbor Chart C & GS 540 (Ex. 2) shows that Ambrose Channel terminates at buoy 18 (JA 530) and that the position where the "WILMINGTON GETTY" anchored was outside Anchorage Area 25 and directly in the navigable throughway utilized by vessels in their approach to the anchorage. (JA 456,457).

Earlier in the morning of May 10, 1973, the

"WILMINGTON GETTY" proceeded on the identical track followed by the "PONCE DE LEON". (Ex. 2, Ex. 5).

Both vessels turned right at buoy 18 and proceeded to the anchorage. This is the customary track followed by all vessels proceeding to anchor after exiting Ambrose Channel at buoy 18 (JA 481). Instead of proceeding further and anchoring, the "WILMINGTON GETTY" dropped its anchor at the first opportunity and obstructed the throughway which would be used by any other vessel seeking to anchor because of the fog. (JA 456, 467, 468, 469).

Captain Dervin, Sun/TTT's expert who was a Master of a vessel for over 28 years, testified that the "WILMINGTON GETTY" anchored in a hazardous position and obstructed the customary navigable throughway which would be used by any other vessel that would be forced to use the anchorage. (JA 456, 468, 471 and 480).

Getty submitted absolutely no evidence whatsoever to refute Captain Dervin's analysis of The Harbor Chart. (Ex. 2). Captain Dervin testified that Ambrose Channel terminates at buoy 18, (JA 456, 530), and that "WILMINGTON GETTY" was anchored in a dangerous location which obstructed the entrance to the only safe anchorage, (JA 309) and hampered the navigation of other vessels seeking a safe anchorage. (JA 456, 457, 468, 469 and 530).

Getty contends that other vessels passed without incident, why could not the "PONCE DE LEON"? (JA 531). Initially, it should be pointed out that "WILMINGTON GETTY" swung with the tide and finally steadied up approximately 10 minutes

before impact. (JA 146, 235, 236). Secondly, the "PONCE DE LEON" was the first vessel which was forced to seek a safe anchorage after the "WILMINGTON GETTY" anchored.

Apparently, Getty's counsel now seeks to designate itself as an expert in pilotage for New York Harbor, and argue that "WILMINGTON GETTY" was not anchored in a dangerous location or obstructing the entrance to the only safe anchorage in the area. The testimony at the trial was clear and the charts (Ex. 2, 21) fully confirm that the District Court's Finding of Fact No. 6 (JA 103) was not "clearly erroneous".

C. THE"WILMINGTON GETTY" FAILED TO TAKE REASONABLE PRECAUTIONS AND ACTION TO AVOID THE COLLISION

Considering the location where the "WILMINGTON GETTY" anchored and the weather conditions existing on May 10, 1973, the "WILMINGTON GETTY" failed to take reasonable precautions, and took no action whatsoever to avoid the collision.

The General Prudential Rule, 33 U.S.C.A. §§221 sets forth:

> "Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case." (Emphasis Supplied).

(1) THE FAILURE OF "WILMINGTON GETTY" TO ISSUE PERIODIC SECURITY CALLS WAS NEGLIGENCE AND CONTRIBUTED TO THE COLLISION.

The District Court found that "WILMINGTON GETTY" was negligent in failing to issue additional periodic security

calls to give advance warning of her status to oncoming vessels. (JA 104, 121, 122).

The Master of "WILMINGTON GETTY" admitted that he ordered the issuance of a security call to warn other vessels of its location in view of the fog and congestion in the area. (JA 229). However, no additional security calls were issued although the "WILMINGTON GETTY" had swung with tide just 10 - 14 minutes before the collision and that such security calls were customarily issued in the Port of New York by anchored vessel in conditions of fog. (JA 230, 231, 346). What use was one security call to warn other vessels of a pecarious situation when numerous other vessels would pass this area over the next five hours and have no knowledge of the WILMINGTON GETTY's situation.

Getty's counsel merely contends now on appeal that such security calls were not reasonable since the "PONCE DE LEON" was negligent in its navigation. Getty's counsel amazingly contends that even if Master of "PONCE DE LEON" heard such a security call, he would not have heeded it. Such allegations are unjustified and totally unfounded. The Master of the "PONCE DE LEON" testified that had he been advised that "WILMINGTON GETTY" was at anchor prior to his turning right at buoy 18, he would have continued on course to the west of the "WILMINGTON GETTY". (JA 317). However, Captain Meade testified that the "WILMINGTON GETTY" appeared to be moving slowly north toward the Verrazano Bridge and he turned right at buoy 18 to enter the anchorage. (JA 312, 313). After turning right at buoy 18, the "PONCE DE LEON" was

advised by the "WILMINGTON GETTY" that she was at anchor. (JA 315). Having already committed itself, the "PONCE DE LEON" had no choice at this point but to continue coming right in an effort to pass between the bow of "WILMINGTON GETTY" and the shoals off Norton's Point. (JA 315, 316, 317).

The "PONCE DE LEON" was the first vessel forced to seek a safe anchorage due to the fog conditions and appellant's argument that various other vessels passed the "WILMINGTON GETTY"without incident is totally irrelevant.

Getty submitted absolutely no evidence at the trial to support its contentions that periodic security calls were not required by the ordinary practice of seamen in the circumstances of the "WILMINGTON GETTY" considering the fog and traffic congestion existing on May 10, 1973. (JA 346).

Therefore, the District Court's Finding of Fact Nos. 10, 11 and 40 were supported by the evidence and not "clearly erroneous".

(2) THE "WILMINGTON GETTY" WAS NEGLIGENT IN FAILING TO KEEP HER ENGINES ON"STANDBY"

The "WILMINGTON GETTY" failed to keep her engines on "STANDBY" (S.B.E.) and thereby contributed to the collision. The Master and Watch Officer of "WILMINGTON GETTY" both testified that if "WILMINGTON GETTY" had her engines on S.B.E., the vessel could have had instantaneous power to move the vessel. (JA 161, 180, 181, 182, 183).

Captain Dervin, Sun/TTT's expert, testified that customarily a vessel anchored, such as the "WILMINGTON GETTY",

in a congested area and in fog should have her engines on S.B.E. (JA 476, 477, 533). Captain Dervin also related how he personally used his engines while at anchor under similar circumstances as the "WILMINGTON GETTY" and completely avoided a potential collision. (JA 479). Getty again submitted no evidence, whatsoever, at the trial regarding what was customary for a vessel, anchored such as the "WILMINGTON GETTY", under the conditions existing on the day in question. Appellants simply relied on The Charles Hubbard, 229 Fed.352, 356 (6 Cir. 1916), which held that a vessel at anchor "under normal circumstances" need not have her engines on S.B.E. The District Court considered The Charles Hubbard, supra, but properly held that:

> "the instant case does not reflect the 'customary' situation of a ship at anchor". (JA 122, 123).

It is interesting to note that in The Charles Hubbard, supra., the Court stated at page 356:

> "There is no evidence whatsoever in the record that it was customary for a ship lying at anchor, as the Pollack was, to maintain engines and boilers in condition for such immediate movement". (Emphasis Supplied).

The only evidence offered at the trial was that a vessel anchored under the circumstances of the "WILMINGTON GETTY", outside the normal anchorage, in the middle of customary navigable throughway to the anchorage, and in dense fog should maintain her engines on S.B.E. The evidence at the trial also indicated that Master of "WILMINGTON GETTY" committed a grave error in judgment in not keeping his engines on S.B.E. (JA 476). Even the Master of "WILMINGTON GETTY"

testified he would keep his vessel's engines on S.B.E. when anchored in fog if he considered the vessel to be anchored in a dangerous position. (JA 232, 233).

In Rederiet for M/T SEVEN SKIES v. S/S North Dakota, 242 F. Supp. 385 (S.D.N.Y., 1962), the vessel anchored and her engines were placed on "STANDBY" and an engineer was on duty in the engine room. The Court held the moving vessel at fault but noted at page 387:

> "Shortly before the collision, the engines of the Seven Skies were ordered slow, then half astern and then stopped. The Seven Skies' master determined it was impossible to get any sternway on the loaded ship before the impending collision. He also determined that since there was no current, paying out the anchor chain would not accomplish anything."

The Court concluded that the anchored vessel did all it could to avoid the collision.

It is interesting to note that in Victorias Milling Co. v. The S.S. Gulfport, 166 F. Supp. 396 (S.D.N.Y., 1958), cited by appellant, the anchored vessel's engines were on "STANDBY". Also, the Court stressed the point that the anchored vessel did all in its power to avoid the collision (pages 398-399).

> "This, the master of the Gulfport testified, indicated to him that the Nonsuco was making a swing to her right, toward the westward, directly across the bow of his ship. Recognizing the danger of collision the danger signal of five or six short blasts of the whistle sounded. The watch officer was dispatched to the bow to slack the anchor chain, a general alarm was rung and the engines were put on slow astern.
>
> These efforts proved abortive." (emphasis supplied).

Getty only points out the conclusion of the Court that the moving vessel was solely at fault. The reasoning of the Court is, however, very relevant because the watch officers of the anchored vessel, had the vessel's engines on "STANDBY", and when they "recognized the danger of collision", slackened her anchor chain and put the engines astern. In spite of this, the collision could not be averted.

The District Court correctly found that the engines of "WILMINGTON GETTY" should have been placed on S.B.E. to provide the vessel with instantaneous power in the event of an emergency. (JA 122, 123).

Further, there is a serious conflict between Captain Brixen and Watch Officer Farago regarding the state of readiness of the engines on the "WILMINGTON GETTY" at the time of the collision. Captain Brixen stated that after anchoring the "WILMINGTON GETTY", he ordered the engine room to have power in three to five minutes. (JA 221) Watch Officer Farago testified that he received no instructions regarding the state of readiness of the engines on the "WILMINGTON GETTY" on the day of the collision, when he relieved the watch approximately one hour before the collision. (JA 160, 232). Watch Officer Farago testified that in emergency situations, the engine room, if prompt, could get power to move the vessel in as little as 15 minutes. (JA 180, 181, 182).

At 1308 when the "PONCE DE LEON" turned right at buoy 18 to head for the anchorage, Watch Officer Farago

considered a risk of collision to exist. (JA 175, 176, 189, 391, 404). However, Farago did not immediately request the engine room to place the engines on S.B.E. for instantaneous power. Either Mr. Farago was not aware of the 3 - 5 minutes state of readiness of the engine room, or he simply neglected to advise the engine room to "STANDBY" and that a risk of collision existed. If we believe the testimony of Captain Briken and the engines were placed on "STANDBY" at 1308, the "WILMINGTON GETTY" would have power at least one to three minutes before the collision and could easily move the vessel astern and avoid the collision.

Either way, the "WILMINGTON GETTY" was negligent in failing to utilize her engines to avoid the collision. The evidence submitted at the trial indicates that if the Watch Officer of "WILMINGTON GETTY" had use of his engines, the "WILMINGTON GETTY" could have gone astern the necessary 15 - 20 feet in a matter of seconds and completely avoid the collision. (JA 476, 477, 478, 479).

There was more than sufficient evidence submitted at the trial for the District Court to hold that the engines of the "WILMINGTON GETTY" should have been placed on "STANDBY" considering the circumstances under which the "WILMINGTON GETTY" anchored. Alternatively, there was ample evidence that the Master of "WILMINGTON GETTY" was negligent in failing to advise Watch Officer Farago of the state of readiness of the engine room and/or for the failure of Watch Officer Farago to place the engines on "STANDBY" when a "risk of collision" existed at 1308, six (6) minutes before the collision.

The District Court Findings of Fact Nos. 7, 8, 9 and 40 are therefore not "clearly erroneous". (JA 103, 104, 112).

3. THE "WILMINGTON GETTY FAILED TO LET GO HER ANCHOR CHAIN ALTHOUGH THE VESSEL HAD AMPLE OPPORTUNITY TO DO SO.

The District Court properly found that "WILMINGTON GETTY" should have let go her anchor chain and failing to do so contributed to the collision. (JA 123,124).

There can be no question that a vessel at anchor must take action, if she can, to avoid collision. As stated in Sun Oil Company v. SS GEORGEL, 245 F. Supp. 537, 545 (S.D.N.Y., 1965):

> "A vessel at anchor which can take action to avoid collision must do so. But an anchored vessel is at first entitled to rely on moving vessels to avoid her. The Lady Franklin, 14 Fed. Cas. p. 934 (No. 7, 984) (D. Mass. 1873). Her first duty is to remain at rest. The Ceylon Maru, 266 F. 396 (D. Maryland, 1920), reversed on other grounds, 281 F. 538 (4th Cir. 1922). If she has the power to avoid the accident, she should do so." (Emphasis Supplied).

The standard set down is that if an anchored vessel sees, or should see, approaching danger, and if she has it in her power to avoid or to mitigate the accident and fails to do so, she is at fault. An anchored vessel which has time and opportunity to avoid collision with a moving vessel, by paying out anchor chain or taking other measures, must do so. Wells v. Armstrong, 29 Fed. 216 (S.D.N.Y. 1886). It is not a defense for an anchored vessel to say it is justified in assuming that an approaching vessel will avoid her if it appears that a collision is imminent. Watch Officer Farago

testified that a "risk of collision" indeed existed at 1308. (JA 404).

This Court in The Richmond, 63 Fed. 1020 (2 Cir., 1894) stated at page 1021:

> "As the boats struck, the mate of the Richmond came on deck, and immediately let out the Richmond's chain. With the strong tide then running, it is apparent that she would have readily swung back if the chain had been seasonably released."

and at page 1022:

> "It is the duty of a vessel brought up in a frequent channel to maintain a vigilant anchor watch, ready to give her chain or sheer her clear of an approaching vessel. The Richmond was anchored at a place presumably inconvenient or embarrassing to the navigation of other vessels. It was a place, also, in which long flotillas of boats in tow of tugs were frequently passing in both directions. The anchor watch did not exercise reasonable viligance to avoid the collision. His explanation of his failure to let out her chain is quite inadequate. There is no reason why the Richmond should not have taken the chain, and we are satisfied either that the man on watch did not attempt to let it out, or did not know how to do so. It is patent that a competent and viligant man might have released the chain in season, if not to have avoided a collision altogether, certainly to have materially mitigated the consequences.
>
> We conclude that the District Court properly condemned both vessels, and that the decree should be affirmed, with interest and costs." (Emphasis Supplied).

There can be no question that the Watch Officer of "WILMINGTON GETTY" agreed that if he realized that a collision would take place, he would have released the anchor chain and let the vessel drift back with the current. (JA 189, 190). The only reason for not so acting was that he mistakenly

observed on the radar that "PONCE DE LEON" would pass clear, ahead of "WILMINGTON GETTY".

The Watch Officer of "WILMINGTON GETTY" would have had no problem releasing the anchor chain since he already had two men on the bow of "WILMINGTON GETTY" and admitted that it would take, at most, two minutes to release anchor chain and allow "WILMINGTON GETTY" to drift astern. (JA 186, 187). The WILMINGTON GETTY's Watch Officer had five (5) minutes within which to release the brake for the anchor chain. Watch Officer Farago testified that a "risk of collision" existed at 1308. (JA 496). A prudent officer would have directed the two seamen at the bow to ready the anchor chain for release if the situation so arose. (JA 494, 495). It is undisputed that the anchor could be "let go" in two minutes and probably less. If Watch Officer Farago advised the bow to take off the anchor pawls and stand by the brake at 1308, the bow would have been ready to release the chain at 1310. In the interim, allowing 3 minutes for radar evaluation, Watch Officer Farago would have been in a position to let go the anchor chain at 1311 - 1312 or two (2) - three (3) minutes before the collision.

The Watch Officer recognized a risk of collision and the danger to "WILMINGTON GETTY" but never took any action. A prudent Watch Officer should prepare the vessel for an emergency if he views a risk of collision to exist. (JA 522, 523, 524 and 525).

The "PONCE DE LEON" did not take any last minute wild maneuvers which surprised Watch Officer Farago. He knew

all along that "PONCE DE LEON" was turning right on a steady curve in an effort to pass between "WILMINGTON GETTY" and the shoals off Norton's Point.

Getty suggests that Mr. Farago was not required to take any action until he "visually" sighted the "PONCE DE LEON", which was seconds before impact. What was the use of radar on "WILMINGTON GETTY" if not to be used as the "eyes" of the ship in fog and reduced visibility as existed on the day in question. Even Watch Officer Farago admitted that if he had evaluated a collision situation by observing the radar, he could have averted the collision by letting go the anchor chain. (JA 189, 190).

Captain Dervin, Sun/TTT's expert, stated unequivocally that "WILMINGTON GETTY" could have completely avoided the collision by letting its anchor chain run and that there was sufficient time to take such action. (JA 495, 496, 526). Even Mr. Fonda, Getty's expert, testified that Watch Officer Farago should have known "PONCE DE LEON" was going to hit the "WILMINGTON GETTY" or that it would"come awfully, awfully close". (JA 553).

Getty submitted no evidence at the trial to even suggest that there was not ample opportunity for the "WILMINGTON GETTY" to release her anchor chain and avoid the collision entirely. Getty now argues that the District Court was in error since it did not state precisely when it thought the "WILMINGTON GETTY" should have let go its anchor chain. The evidence is clear, however, that "WILMINGTON GETTY" had more

than sufficient time to "let go" the anchor chain and drift back with the flood tide and completely avoid the collision.

The Watch Officer of "WILMINGTON GETTY" knew a risk of collision existed at 1308. He could have immediately advised the seamen on the bow of "WILMINGTON GETTY" to prepare the anchor chain to be ready to "let go" at his command. A radar computation commenced at 1308 when a "risk of collision" existed would have provided the Watch Officer of "WILMINGTON GETTY" with a plot at 1311 - 1312 hours. At the time of completion of his radar plot, the seamen on the bow of "WILMINGTON GETTY" would then have been ready to immediately "let go" of the anchor chain instantaneously by releasing the brake and letting the anchor chain run. This would have given the "WILMINGTON GETTY" two (2) - three (3) minutes to drift back with the tide the mere 15 -20 feet necessary to avoid the collision. (JA 478).

The Findings of Fact Nos. 15, 26, 31, 32, 33 and 40 by District Court in this regard are fully supported by the evidence and not"clearly erroneous". (JA 105, 108, 110, 112).

(4) THE FAILURE OF "WILMINGTON GETTY" TO MAKE A MANUAL PLOT ON RADAR CONTRIBUTED TO THE COLLISION WITH PONCE DE LEON.

The District Court found that the "WILMINGTON GETTY" was negligent in failing to make a manual plot on radar of the movements of "PONCE DE LEON" (JA 119, 120). Unquestionably, the evidence presented at the trial below established that if the Watch Officer of "WILMINGTON GETTY" properly utilized its radar, the collision would have been completely avoided.

Getty contends that the District Court was in error in holding that an anchored vessel has the same duty as a moving vessel to properly use its radar. However, Getty cites no authority for this proposition and infers that when a vessel is at anchor and utilizing its radar, it does not have a duty to use such radar in the proper, safe and recommended manner. It is submitted that all vessels whether at anchor or underway have a duty to "properly" use its radar in the recommended manner.

Our Courts have always recognized that it was negligence not to make proper use of radar. Article 29, 33 U.S.C. §221. In Skibs A/S Siljested v. S/S Matthew Luckenbach, 215 F. Supp. 667 (S.D.N.Y., 1963) it was noted at page 680:

> "*** These scientific installations and particularly radar, are potentially most valuable instruments for increasing safety at sea; but they only remain valuable if they are intelligently used, and if officers responsible for working them work them and interpret them with intelligence. That is only another way, I think, of saying a good lookout must be maintained. A good lookout involves not only a visual lookout, and not only the use of the ears, but also involves the intelligent interpretation of the data received by way of these various scientific instruments.
>
> The Court of Appeals' prophecy in Polarus Steamship Co., Inc. v. T/S Sandefjord, 236 F. 2d 270 (2d Cir., 1956) is forcefully applicable here: 'Had successive observations been plotted to determine the course and the speed of the Polarusoil...But the master of the Sandefjord (Matthew Luchenbach) made no such calculations; he merely guessed that the Polarusoil (Francisville' was steering a course parallel to the coastline". (Emphasis Supplied).

The Canadian Courts have also held, as set forth

in Ove Skou Rederi A/S v. Nippon Yusen Kaisha Ltd., 1971 A.M.C. 470 (not officially reported) (Supreme Court of Canada) at page 471:

> "I agree with the learned trial judge that both vessels were at fault and that the faults of each contributed to the collision in equal degree, but I am content to rest my opinion as to their common fault on the fact that no proper radar lookout was maintained by either vessel and that each failed to take early and substantial action..." (Emphasis Supplied).

This Court reiterated the advantages of radar as a device to see through fog in Afran Transport Co. v. The Bergechief, 170 F. Supp. 893 (S.D.N.Y., 1959), aff'd 274 F. 2d 469 (2 Cir. 1960). The use of radar includes making timed measurements of bearing and distance to the radar target of a ship observed on the radar scope, and some form of plotting by a competent observer to calculate course, speed and closest point of approach, (C.P.A.) of another vessel. In Afran Transport, the court stated its answer to S/S Bergechief's contentions at page 899:

> "That the use of radar was discontinued because...there was insufficient time for the Bergechief to perceive from her radar that any change in relative motion had occurred; that it was impossible for the Bergechief to determine from a radar plot Burgan's course and speed because it was impossible for Bergechief to know her own speed since she was decelerating, and further, that there was not sufficient time available to Bergechief to permit her to plot the course and speed of Burgan.
>
> Bergechief's contentions, above mentioned in my opinion, lack merit." (Emphasis Supplied).
>
> Further, the Court noted:
>
> "As stated by Byers, District Judge, in

> The Medford, D.C.E.D.N.Y., 1946, 65 F. Supp. 622, 626: "The perfection of that device (radar) is thought to have invoked a new concept of the responsibilities attaching to vessels so equipped, touching their handling and operation in or near a fog-bound area." The invention of radar has increased many times man's ability to "see." 32 Cornell Law Quarterly 570.
>
> The failure of the Bergechief to utilize this anti-collision device under conditions of extreme danger was a factor contributing to the collision. (Emphasis Supplied).

Here Watch Officer Farago observed the "PONCE DE LEON" on radar and considered that a "risk of collision" existed at 1308 hours. (JA 404, 496). He did not make a plot or compute her closest point of approach (C.P.A.). (JA 176, 177). Mr. Farago testified that it looked as though "PONCE DE LEON" would pass clear ahead. (JA 187). The sad fact is that it did not. Getty contends that there was insufficient time for Mr. Farago to accurately evaluate the radar. Getty's counsel argues that a plot could not be made from "1311" until the collision at "1314". However, counsel for Getty does not state why a plot could not be commenced at "1308" when Watch Officer Farago recognized a risk of collision to exist. Watch Officer Farago observed on radar that the "PONCE DE LEON" was at risk of collision at 1308 hours. In three (3) minutes, or at 1311 hours, he could have easily evaluated the situation and this still allowed him three (3) minutes to take evasive action. The Court in Afran Transport, held that in 3 minutes a competent radar observer could easily determine if a vessel was on a collision course. This is conceded by counsel for Getty.

Captain Dervin testified that Mr. Farago had

more than sufficient time to realize the situation and let go the anchor chain and completely avoid the collision (JA 481, 494, 495). Even Getty's expert, Mr. Fonda, a radar technician, testified that Mr. Farago could have determined that "PONCE DE LEON" was "going to hit him or come awfully, awfully close." (JA 553).

Watch Officer Farago admitted that if he calculated on radar that "PONCE DE LEON" was going to collide with "WILMINGTON GETTY", he would have let the anchor chain run and avert the collision. (JA 189, 190).

Getty's counsel insists that the PONCE DE LEON's use of radar was negligent and contributed to the collision but commends its Watch Officer for utilizing its radar in the identical manner.

There is more than ample evidence to support the District Court's finding that the failure of the "WILMINGTON GETTY" to make a manual plot of the "PONCE DE LEON" on radar contributed to the collision. The District Court's Findings of Fact Nos. 26, 27 and 40 were not "clearly erroneous". (JA 108. 112).

POINT III

THE DISTRICT COURT's DETERMINATION OF PROPORTION OF FAULT IS A QUESTION OF DAMAGES PROTECTED BY THE CLEARLY ERRONEOUS TEST

The District Court found both vessels negligent and then assessed the "PONCE DE LEON" responsible for 80% of the damages and "WILMINGTON GETTY" responsible for 20% of the damages.

Appellant contends that the percentage of assessment of damages is reviewable as a "matter of law". In support

of its position, Getty cites Mamiye v. Barber S.S. Lines, Inc., 360 F. 2d 774 (2 Cir.,1966). This decision had nothing whatsoever to do with the percentage of fault assessed by a trial court. The Mamiye decision dealt strictly with the review of the legal standard to determine "negligence" or lack thereof. It had nothing to do with the assessment of proportion of damages. After a determination by the trial court that the respective parties were "negligent", a determination by the trial judge of the percentage of fault is a question of fact. Judge Levet after a finding of negligence on the part of both vessels, found "PONCE DE LEON" responsible"for 80% of the damages" and "WILMINGTON GETTY" responsible "for 20% of the damages".

The determination of the percentage of damages has always been a fact-finding function of the trial court. Haynes v. Rederi A/S Aladdin, 362 F. 2d 345, 348 (5 Cir.1966); Hildebrand v. United States, 226 F. 2d 215 (2 Cir.1955).

That the "clearly erroneous" rule is applicable to this factual determination is unquestioned. Gardner v. National Bulk Carriers, Inc., 333 F. 2d 676 (4 Cir., 1964); Gypsum Carrier, Inc. v. Handelsman, 307 F. 2d 525 (9 Cir. 1962). More importantly, should this court set a precedent for modifying a trial judge's percentage of comparative fault by amending such percentages from 80% - 20% to 90% - 10% etc? It is submitted that such minor modifications by an appellate court would lead to appeals in every instance involving a determination by the trial court of the proportionate fault of the respective parties. Such determinations by the trial

court should, therefore, be left undistrubed unless "clearly erroneous".

Getty's counsel suggests that this Court should look to English decisions with respect to proportionate fault because the English Courts have been dealing with the comparative negligence doctrine for many years. The inference is that since our Courts have had the "divided-damages" rule, trial judges are not accustomed to assessing proportionate fault and appeals courts have little or no experience in reviewing such determinations by the trial court. Such is not the case. Our courts have long applied the comparative negligence doctrine in personal injury cases. Certainly, it would not be difficult for a trier of the fact to apportion respective damages, be it a personal injury action or collision between two vessels. The reliance on English decisions does not appear to be warranted, especially on the appellate level, where the basis for reversal or modification of a trial court's finding probably differ considerably between U.S. and English Courts.

In any event, the U.S. Supreme Court in United States v. Reliable Transfer Co., 421 U.S. 396 (1975) indicated that the trial court should be guided in assessing the proportion of damages by the principles heretofore utilized in personal injury actions. Mr. Justice Stewart stated at page 407:

> "Potential problems of proof in some cases hardly require adherence to an archaic and unfair rule in all cases. Every other major maritime nation has evidently been able to apply a rule of comparative negligence without serious problems, see Mole & Wilson, A Study of Comparative Negligence, 17 Corn. L.Q. 333

> 346 (1932); In re Adams' Petition, 125 F. 2d 884 (CA2), and in our own admiralty law a rule of comparative negligence has long been applied with no untoward difficulties in personal injury actions. See, e.g., Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409. See also, Merchant Marine (Jones) Act, 38 Stat. 1185, as amended, 41 Stat. 1007, 46 U.S.C. §668; Death on the High Seas Act, 41 Stat. 537, 46 U.S.C. &766." (Emphasis Supplied).

Therefore, Judge Levet's assessment of the percentage of damages is not "clearly erroneous" and should be affirmed.

However, if this court decides to review and amend the percentage of damages, it is submitted that a finding of 70%/75% responsibility for the damages as against the "PONCE DE LEON" would be more equitable under the circumstances. The "WILMINGTON GETTY" had the opportunity to completely avert the collision with a minimal amount of effort on its part but took no action whatsoever to avoid the collision.

CONCLUSION

The judgment of the District Court should be affirmed. Alternatively, the proportion of damages assessed against the "PONCE DE LEON" should be modified.

Dated: February 18, 1977

Respectfully Submitted,

DOUGHERTY, RYAN, MAHONEY, PELLEGRINO & GIUFFRA
Attorneys for Defendants-Appellee and Cross-Appellants, Sun Leasing Co., Inc. and Transamerican Trailer Transport, Inc.

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Of Counsel

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

COURT OF APPEALS
FEDERAL COURT

Index No.

GETTY OIL COMPANY, (Easter Operations),
Plaintiff-Appellant-Cross-Appellee,

- against -

Affidavit of Personal Service

SS PONCE DE LEON, her engines, tackle etc., SUN LEASING CO. and TRANSAMERICAN TRAILER TRANSPORT, INC.,
Defendants-Appellees-Cross Appellants.

STATE OF NEW YORK, COUNTY OF *ss.:*

I, James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 112 West 136th Street; New York, New York

That on the 22nd *day of* Feb. *19* 77 *at* 576 Fifth Avenue
New York, New York

deponent served the annexed *upon*

Brief

Dougherty, Ryan, Mahoney
Pellegrino & Giuffra, Esqs.

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this 22nd
day of Feb. *19* 77

Robert T. Brin

James A. Steele

James A. Steele

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977